in officers and directors as well as shareholders with 1% or more of the outstanding voting stock. n8 The holdings of bank trust departments and investment and insurance companies are subject, however, to a 5% benchmark. n9 For closely-held corporations; i.e., those with fewer than fifty shareholders, a cognizable interest is inherent in officers, directors and all shareholders. Any voting partnership or proprietorship interest is congnizable.

n7 Further Notice of Proposed Rule Making, Docket No. 20548, 63 FCC 2d 832 (1977).

n8 47 CFR 73.35, 73.240, 73.636, note 3.

n9 Id., at notes 4 and 5.

C. Historical and Comparative Perspective

10. Multiple ownership restrictions in the broadcast context first became effective in the early 1940's. n10 In 1953, the Commission concluded a five year rule making proceeding on multiple ownership by adopting the seven station rule as well as attribution rules that considered ownership of 1% or more of the voting stock in a corporate licensee with more than 50 shareholders to be a cognizable interest. The Commission reasoned that "owners of 1% of the stock may have considerable voice in the control and management" of corporate licensees. Amendment of Multiple Ownership Rules, supra at 294 (emphasis added). As early as 1953, the Commission considered an attribution benchmark of at least 5%. Id. The 1% attribution rule was upheld by the court of appeals on remand of a case from the Supreme Court that challenged the multiple ownership rules. Storer Broadcasting Co. v. United States, 240 F.2d 55, 56 (D.C. Cir. 1956). The court observed, however, that interests of more than one percent do not necessarily constitute control. Id. 10 The Commission adopted multiple ownership rules for FM broadcasting in 1940, 5 FR 2384 (June 26, 1940); television broadcasting in 1941, 6 FR 2284 (May 6, 1941); and AM broadcasting in 1943, 8 FR 16065 (November 27, 1943).

11. Over the years, the 1% rule has been modified to accommodate the investment objectives of certain institutions presumed to be "passive" investors who were concerned with investment profits and who did not invest for purposes of control or influence over programming. The first modification was made in 1968 when the benchmark for cognizable ownership interests was raised from 1% to 3% for investment companies. n11 Report and Order, Docket 15627, 13 FCC 2d 357, 369-70 (1968). The effect of this exception was to permit investment companies to own up to 3% of the voting stock of a broadcast licensee before that interest became cognizable. In 1972, the broadcast multiple ownership rules were amended to raise the benchmark from 1% to 5% for the ownership of broadcast licensee voting stock by bank trust departments. Report and Order, Docket 18751, 34 FCC 2d 889 (1972). At that time, the Commission declined to raise to 5% the benchmark for bank trust department holdings in cable systems. Id. at 892.

n11 Investment companies (mutual funds) are defined by Section 80(a)(3) of the Investment Company Act of 1940. 15 U.S.C. 80(A)(3).

12. A rule making proceeding commenced by the Commission in 1975 culminated in further expanding the modifications to the 1% rule. The Commission adopted 5%

as the standard for determining a cognizable interest for insurance companies, bank trust departments and investment companies. Multiple Ownership and Cross Ownership, 59 FCC 2d 970, 975 (1976), aff'd sub nom. National Citizens Committee for Broadcasting v. FCC, 559 F.2d 187 (D.C. Cir. 1977). Both the broadcast multiple ownership rules and the cable television cross-ownership rules were amended to adopt the 5% benchmark for bank trust departments, insurance companies and investment companies. The Commission found this action to be "in the public interest because it will most likely increase investments in broadcast and cable companies and thus strengthen the economic foundation of the broadcasting and cable industries without creating undue concentration of control." Id. at 974-75.

13. As part of the multiple ownership rule making in Docket No. 20548, the Commission also proposed the adoption of a uniform 10% attribution rule for the duopoly, one-to-a-market and the regional concentration rules. 54 FCC 2d 331, 335 (1975). The Commission proposed the 10% attribution benchmark with the provision that investors would file a disclaimer of intent to control the licensee or station. This proposal received very little attention in the comments filed in the proceeding. In a Further Notice of Proposed Rule Making, the Commission again sought comment on the 10% attribution proposal. 63 FCC 2d 832 (1977). This rule making still is pending.

14. As a point of reference, it may be useful to compare the Commission's current 1% and 5% attribution rules with other federal legal ownership requirements. The alien ownership provisions of the Communications Act provide that aliens may own no more than 20% of the capital stock of a corporate licensee, nor may aliens own or control more than 25% of the capital stock of a controlling corporation whose subsidiary holds a license. 47 U.S.C. 310(b)(3)-(4). Two of the statutes that govern the Securities and Exchange Commission ("SEC") contain provisions that may provide a useful reference point for the present analysis. The Securities and Exchange Act of 1934 provides that any person who acquires more than 5% of certain classes of securities must disclose specified ownership and background information to the issuer, stock exchanges and the SEC. 15 U.S.C. 78m(d)(1). On the other hand, the Investment Company Act of 1940 provides a 25% benchmark for control of a corporation. 15 U.S.C. 80a-2(a)(9). That Act presumptively defines "control" as the direct or indirect beneficial ownership of more than 25% of the voting securities of any company. Id. We note that these statutes are referenced only for illustrative purposes; public policy considerations may require the adoption of unique ownership attribution benchmarks for telecommunications.

III. Need for the Notice of Proposed Rule Making

15. One of the statutory mandates of the Commission is "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service * * *" 47 U.S.C. 151. Sections 154(i) and 303(r) of the Communications Act grant the Commission broad authority to enact appropriate regulations to further the Commission's statutory purposes. As explained below, we believe the attribution rules may work against the realization of an efficient nationwide radio service by unnecessarily limiting the number and location of broadcast and cable television interests that may be held. Accordingly, it is important that we scrutinize the policies that underlie the rules to ensure that our statutory objectives are

being fulfilled by the rules, that the costs and impact are not outweighing their benefits and that those costs imposed upon society are not excessive or creating disproportionate economic inefficiencies.

16. To the extent that our rules are based upon economic concentration considerations, it is appropriate for the Commission to consider whether the attribution rules advance the objectives of the antitrust component of the public interest standard embodied in the Communications Act. The antitrust laws provide guidance for making our public interest determinations in this area. The attribution rules should be scrutinized to insure that they advance antitrust objectives and further the public interest in efficiency of operation, investment decisions and consumer welfare. n12 Unnecessarily restrictive attribution rules could hinder the most efficient combination of video distribution resources by erecting ownership standards which proscribe combinations that would not be suspect under the Justice Department's recently revised antitrust and merger guidelines. n13

n 12 See generally, Bork, The Antitrust Paradox, Ch. 2. (1978); and Posner, Antitrust Law: An Economic Perspective, Ch. 1. (1976).

n 13 2 Trade Reg. Rep. (CCH) para. para. 4501-05.

17. It is particularly important to determine whether the attribution rules further the Commission's concern for program diversity. The ownership benchmarks may be set at levels that do not reflect ability to control the programming of a licensee. Depending on variable criteria, 1% equity ownership of a corporate licensee may or may not vest power in an entity to control station programming. Nevertheless, the attribution rules implicity make the assumption that such control exists. A benchmark that is not a reasonably tailored proxy for control over programming will not advance diversity concerns yet will curb broadcasting investments. The public interest suffers from such unnecessary government intrusions.

18. We also are concerned that our current attribution rules may create a restraint on the amount of capital that otherwise would flow into broadcast or cable television ventures. Capital resources are difficult to obtain in today's economy. n14 Operators frequently must turn to non-traditional means of financing to obtain needed capital. Such techniques may provide for acquisition of subordinated equity holdings which quickly may bring investors to the ownership limits permissible under the Commission's Rules. Thus, the attribution rules may impose an impediment to increased investment. We may find in reevaluating our rules that the assumptions prevalent at the time of adopting the rules are no longer valid or, even more likely, that certain ownership patterns are not necessarily correlated to the possibility of control over corporate licensees.

n 14 Newsweek magazine recently reported that venture capitalists back only 2 or 3 out of every 100 new proposals that they receive. Newsweek, June 14, 1982, p. 19E.

19. Telecommunications is one area of the economy that today is showing real signs of positive growth and the concomitant need for investment capital. In addition, recent deregulatory actions of the Commission have increased the need for capital resources. For example, the Commission's deregulation of the

7

subscription television service, n15 authorization of the direct broadcast satellite service, n16 and low power television n17 each will create additional demands for telecommunications investment capital. n18 Since these services (aside from STV) have no formal ownership and attribution rules per se, the existence of restrictive broadcast and cable television attribution rules may distort the flow of investment capital into the new unfettered services.

n15 47 FR 30069 (July 12, 1982) (to be codified at 47 CFR 73.642-643).

n16 Report and Order, Gen. Docket No. 80-603, adopted June 23, 1982; released July 14, 1982, FCC 82-285, 47 FR 31555 (July 21, 1982).

n17 Report and Order, BC Docket No. 78-253, -- -- FCC 2d -- -- , 51 RR 2d 476 (1982).

n18 The potential expansion of the multipoint distribution service to a multi-channel service may, if authorized, create additional demands for capital in the video distribution market. See In re Applications for Developmental Authorizations to Construct and Operate a Multichannel Over-the-Air Pay Video Service in the 2 GHz Band. File No. BPEX-8208-02-KH (Aug. 2, 1982).

20. An additional public benefit that may be derived from our modifying the attribution rules as a result of this proceeding is that new entrants in general, and minority group entrants in particular, should enjoy additional capital availability. It has been advocated that potential minority group investors are foreclosed from opportunities in telecommunications due to their inability to obtain adequate financial support. n19 Minorities often must seek funds from secondary lenders, such as venture capitalists, Small Business Investment Companies (SBIC) and Minority Enterprise Small Business Investment Companies (MESBIC). n20 Due to the restrictions on ownership established by the Commission's multiple ownership and attribution rules, lenders who acquire equity interests in licensees may have to restrict the number of ventures in which they participate. One of the public interest reasons for seeking to expand the attribution benchmarks in this proceeding may be to facilitate more readily available financing for minority group applicants. A recent report to the Commission indicates that the operation of the Commission's attribution and ownership rules actually may constitute a barrier for minority group entrepreneurs entry into the field of telecommunications. n21 It thus appears that it may be in the public interest for the Commission to lift some of the restrictions on investment created by the attribution rules to increase the opportunity for new entrants and applicants.

n19 See Strategies for Advancing Minority Ownership Opportunities in Telecommunications, FCC Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications Final Report, (May 1982), at 25-30.

n20 SBICs and MESBICs are licensed, regulated and partially financed by the Small Business Administration. See 15 U.S.C. 661 et seq. For an overview of the operation of these federally-chartered investment companies, see Turner, SBICs, MESBICs and Conflicts of Interest, 36 Fed. Bar J. 185 (1978).

n21 Strategies for Advancing Minority Ownership Opportunities in Telecommunications, supra note 19, at 14.

IV. Options for Revision of the Commission's Attribution Rules.

21. We intend in this proceeding to conduct a fresh inquiry by examining regulatory options ranging from attribution only for interests over 20% to maintaining the status quo ante. We also will inquire, whether, in light of the rapid changes in the services offered by financial institutions, the Commission should change its current position of specifying particular financial institutions subject to the 5% attribution rule in favor of either broad rules or a set or sets of indicia to identify on an ad hoc basis, the various entities that should be subject to certain levels of attributable interests due to their potential for licensee control.

22. First, we solicit comment on the broad question of whether the public interest requires attribution of an ownership interest of less than 20%. Under our current statutory scheme, a 20% interest in a licensee is the maximum direct interest that may be held by aliens. n22 The common denominator in both the Commission's multiple ownership rules and the statutory ownership limit is that there is a minimum level at which influence or control is presumed. Given Congressional guidance that a 20% level of interest confers such control, an amount greater than that for purposes of applying the multiple ownership rules does not appear to be appropriate. We seek comment on what probable ownership patterns would emerge under this standard.

n22 47 U.S.C. 310(b)(3).

23. Comments and data are also requested on the advisability of substituting a definition and set of indicia of control to be applied on a case-by-case basis for the current practice of specifying particular entities subject to certain ownership benchmarks. n23 In this connection, comments are requested on the advisability of establishing a set of presumptions to assist the Commission in making case-by-case judgments. For example, a conclusive presumption could be established that a 20% or greater ownership interest in a licensee portrayed a cognizable interest in the entity. On the other hand, a rebuttable presumption could be established that less than 20% ownership of a licensee does not constitute a cognizable interest. As a starting point, indicia that could be analyzed for making control determinations for less than 20% ownership could include, inter alia:

n 23 It should be noted that in 1964 the Commission abandoned its previous practice of dealing with multiple ownership problems on an ad hoc basis in favor of a "particularized" standard. 1964 Multiple Ownership Rules, note 7, supra at 1479. There may be administrative burdens associated with a case-by-case approach, and we request comments on the possible burdens to applicants and the Commission.

-- Potential for management influence and control; n24

n 24 At least with respect to larger corporations, there is some debate whether management or owners (i.e., stockholders) control the company. See e.g., F. M. Scherer, Industrial Market Structure and Economic Performance 32-33 (2d ed. 1980). This point is especially relevant to the underlying premise of the multiple ownership rules which assumes that programming decisions are made by, or are the responsibility of, officers, directors and shareholders.

-- Size of ownership interests;

-- Nature of ownership interests, i.e., type and nature of partnership or other non-corporate interest and the type and quality of corporate ownership interest (voting or non-voting stock);

-- Significant holdings of non-voting interests;

-- Power to sell or control the sale of securities and the impact such sales would have on other holders of that security;

-- Interlocking directorates with other relevant corporations;

-- Express disclaimers of control (such as insulation letters executed by bank directors disavowing intent to participate in trust department activities);

-- Coextensive federal or state securities and investment regulation;

-- Dispersion of stock among shareholders;

-- Existence of voting trusts, shareholder agreements or other non-voting equity interests such as preferred stock;

-- Redemption, liquidation or convertability rights in stock or other securities;

-- Ownership interests of parent or affiliated corporations.

24. In connection with the above indicia of control, an option exists to essentially shift the burden of proof as to whether a particular entity exercises control over a media property. Under this option, an entity would only be attributed with those media interests if it is affirmatively demonstrated by the Commission or others that actual control under the indicia will occur. Comment is sought as to the effectiveness of this approach.

25. Another option upon which we seek comment is the advisability of linking the Commission's attribution rules to other legal or regulatory requirements. For example, should we establish a disclosure requirement for persons or entities that own more than 5% of the voting securities in a corporate licensee as required by the 1934 Securities and Exchange Act? 15 U.S.C. 78m(d)(1). The attribution rules could be modeled after the Commission's 20% alien ownership rules. The advantages of linkage of the attribution rules with other regulatory requirements are that consistency of federal regulations would be enhanced, and the reporting and administrative burden on licensees and investors may be reduced. On the other hand, the underlying public interest considerations in telecommunications may be unique, and we may not necessarily be able to rely upon other standards of regulatory ownership.

26. A final regulatory option is to retain the current attribution levels. Are the current attribution rules set at appropriate levels to prevent influence over licensees and yet ensure adequate availability of capital? Should the attribution benchmarks be raised to some level less than 20%? Given the recommendation of the Commission's Advisory Committee on Alternative Financing,

would it be appropriate to maintain the present attribution rule structure and grant a higher benchmark for SBICs and MESBICs to increase the availability of capital for the acquisition of telecommunications facilities by minority entrepreneurs? n25 Specific data and facts should be provided to demonstrate whether the current rule structure is justified. Should the current benchmarks be retained with a revisonary effort directed toward clarifying the explanatory notes? Would the public be served better if the FCC modified the current benchmarks to provide a flat, across-the-board standard?

n 25 Strategies for Advancing Minority Ownership Opportunities in Telecommunications, supra note 19, at 16. See also, Petition for Rule Making on Minority Ownership, National Association of Black Owned Broadcasters ("NABOB"), October 1981. The NABOB Petition, inter alia, requests the Commission to consider exempting MESBICs from the multiple ownership rules.

27. We have sought comment on the issue of how the attribution rules should function in conjunction with the use of voting trusts and the ownership of non-voting preferred stock. n26 These forms of ownership, expressly avoiding control, insulate the holder from attributable ownership interests. n27 In reevaluating the attribution rules, the Commission will take into account comments in BC Docket No. 78-239 (non-voting equity ownership interests in corporate licensees). To the extent that those comments require alteration in light of the higher benchmarks now under consideration, we request that that information be submitted.

n 26 The pending Notice of Inquiry and Proposed Rule Making in BC Docket No. 78-239, explores various issues related to voting trusts and non-voting stock. 68 FCC 2d 1302 (1978).

n 27 Evening Star Broadcasting Co., Inc., 68 FCC 2d 129, 135-36, reaff'd as modified on other grounds, 68 FCC 2d 158 (1978); Bonneville International Corp., 43 RR 2d 863, 865 (1977).

28. One issue on which we are especially interested in obtaining comments is the effect that a change in the attribution rules would have on the investment community and entrepreneurs seeking financing for telecommunications ventures. To what extent would minority group members and new entrants have greater access to financing if the restrictions were eased?

29. The Commission is interested in obtaining public comment on the advisability of treating all investors in a similar fashion. For example, should bank trust departments, insurance companies, investment companies, mutual funds, venture capitalists, SBIC/MESBICs, pension funds, investment clubs and others be accorded identical treatment under the attribution rules? Are there policy or legal reasons why a different standard should apply to any particular group of investors? Should different benchmarks be established for active and passive investors; should there be no distinction or should the distinction be framed differently? Should "passive" investment be defined in a different manner than it has in the past? What is the optimal mix of benchmarks for the different investment groups? Should the attribution rules be the same for national, regional and local ownership situations, or are there reasons for delineating specific rules for each? In this connection, should the Commission explicitly link its cross interest policy to the attribution benchmarks? Should the attribution rules vary according to the type of media or with mode of

distribution?

30. Apart from the ownership benchmark portion of the attribution rules, we seek to elicit comment on the degree to which indirect interests are attributed. Comments are sought on the appropriate approach for attributing ownership interests in vertical ownership situations. Should the current approach of mechanically determining whether each level of ownership exceeds the benchmarks be replaced with a more efficacious method of limiting the effect of the attribution benchmarks to only those entities with a reasonable nexus to the licensee? Should a "multiplier" be used to limit the effect of the attribution benchmarks such as that which currently is used in the alien ownership context? n28 For purposes of illustrating the current "chain effect" of the attribution rules in the vertical ownership context, consider the following example: The X Corporation is the licensee of two standard broadcast stations. Twenty percent of X's voting stock is owned by Y Company. In turn, five percent of Y's voting stock is owned by Z Corporation. Under our current attribution rules, to compute ownership for all of the multiple ownership rules, the two stations would be attributed to X, Y and Z, since the chain effect would mean that each owns 1% or more of the voting stock in the company below. Each corporate entity itself has a greater than 1% interest. In addition, officers and directors of Z Corporation would have a cognizable interest in the two stations. Using a multiplier approach, Z's interest in X, the licensee, would be 1% (5% of 20%). Under the current benchmark, that is a cognizable interest. Using a higher benchmark, the interest would not be reportable for multiple ownership purposes.

n28 See e.g., Glaser & Fletcher, 33 R.R. 2d 37, 38 (1975); and Watkins, Alien Ownership and the Communications Act, 33 Fed. Comm. L.J. 1, 32 n. 128 (1981). We use the word "multiplier" to describe the reduction of an intermediate investment entity's interest in the licensee.

31. Closely related to the chain effect on voting interests is the issue of imputing those interests to non-shareholder officers, directors, partners and trustees. Commenters are asked to address whether and to what extent these parties should be attributed with media interests of their corporations or non-incorporated associations such as limited partnerships. Assuming a multiplier approach is adopted as a method for establishing a nexus to programming decisions for those entities with ownership interests, what similar types of limiting devices may be used for non-interest owning corporate officers and directors and non-corporate representatives? An option would be to attribute a corporate or non-corporate entity's cognizable media interests to the officers, directors and other representatives except where specific, affirmative insulating mechanisms are employed; e.g., letters abdicating responsibility for an disavowing intent to participate in decisions directly affecting station operation and programming.

32. Another issue requiring comment concerns corporate size and the attribution rules. The concerns of closely-held and widely-held corporations appear to be somewhat different with regard to investment financing. New licensees, particularly minority groups often organize as closely-held corporations. The attribution rules relevant to close corporations require that any equity interest be cognizable. On the other hand, the larger widely-held broadcasting and cable television operations have a different concern. n29 Large scale investors may be able to invest in only one or a few of the larger widely-held communications firms because the attributable holdings may run afoul

of, e.g., the duopoly or regional concentration rules. Moreover, in combination with the ownership transfer constraints of 47 U.S.C. 310(d), the ownership of a remote attributable interest in a single broadcast property may delay or preclude a takeover bid by another entity. This effect may skew the normal operation of corporate financial affairs.

n29 Even the larger communications concerns are relatively small compared to other domestic corporations. Some of the larger broadcasting firms do not even rank in the Fortune 500. B. Compaine, C. Sterling, T. Guback & J. Noble, Who Owns the Media? 327 (2d ed. 1982).

33. Given these circumstances, we therefore inquire into the distinction the Commission has drawn between closely-held and widely-held corporations. Should the same attribution rules apply to each? Is there a justifiable reason for continuing to define a closely-held corporation as one that has 50 or fewer share-holders? n30 Should a closely-held corporation be redefined in terms of 25 or fewer shareholders, n31 or should the quantitative approach be abandoned in favor of a functional definition? Should the Commission's traditional distinction between closely-held and widely-held corporations be deleted as being unduly discriminatory against the efforts of closely-held corporations to raise capital? Should closely-held corporations be subject to a higher attribution benchmark because a higher proportion of stock ownership may be necessary to influence the corporation? Comment is also sought whether non-corporate associations should be treated in a manner similar to closely-held corporations and to what extent equity interests such as limited partnership interests are equivalent to corporate equity interests for attribution purposes.

n30 In 1976 the Commission reaffirmed the 50 shareholder cutoff as the distinction between closely and widely-held corporations. First Report and Order, Docket No. 20521, 59 FCC 2d 905, 906 (1976).

n31 See 26 U.S.C. 1371(a).

34. It has been noted that private pension funds currently control over $400 billion of investment capital. 3 n2 Those assets constitute one of the largest available pools of investment funds. Although pension funds are subject to the 1% ownership rule in all FCC multiple and cross-ownership contexts, 3 n3 we currently have pending an undocketed petition for rule making requesting a 5% cognizable ownership level for pension funds. 3 n4 Should these funds be subject to the same benchmarks as investment and insurance companies and other apparently passive investors?

n 3 2 American Council of Life Insurance, 1982 Life Insurance Factbook 50 (1982).

n 3 3 A special exception has been carved out for the College Retirement Equities Fund ("CREF"), which provides pension plans for educational institutions. The Commission has treated CREF like an investment company and permits it to take advantage of the 5% benchmark due to its passive investment objectives. Multiple Ownership and Cross Ownership, 59 FCC 2d 970, 979 (1976).

n 3 4 RM-4045, filed January 27, 1982, by The Centennial Fund.

35. Reporting ownership interests raises questions on which we also seek

comment. In terms of cognizable interests, should the Commission continue to monitor ownership activity by requiring the submission of reports on FCC Form 323 pursuant to 47 CFR 73.3615 and FCC Form 325, schedules 3 and 4 pursuant to 47 CFR 76.403? If so, how often should such disclosures be made? Are routine reports necessary or should the Commission address ownership questions only in the context of license assignment and transfer of control situations or only when the ownership benchmarks are exceeded?

36. Finally, an issue also exists with regard to the ability of parties to evade the proscriptions of the multiple ownership rules. Under the current attribution structure, entities may be able to avoid a strict application of the multiple ownership rules by maintaining independent accounts, each of which contains less than a cognizable voting interest in the licensee, but aggregated exceed that amount. For example, Mr. Q may maintain accounts in two separate brokerage houses with 0.5% of the outstanding voting shares of each of the three national television networks in each account. The networks, as licensees, are required to furnish information regarding their shareholders having the right to vote 1% or more of their stock. Although each brokerage house may hold in its "street name" an aggregated interest greater than 1% of the stock of each network, Mr. Q would not appear as having the right to vote that amount. Hence, our reporting requirements in connection with the benchmarks would not disclose Mr. Q's otherwise cognizable interest in each network. Comment is sought as to whether there is an administratively workable mechanism that would prevent parties from evading our ownership constraints by breaking down their interests into non-cognizable discrete investments.

V. Tentative Recommendations

37. After reviewing the ownership benchmarks, the mechanism for imputing them, their regulatory history and Commission decisions construing these rules, we believe that some of the burdens currently imposed by the attribution rules should be removed. The benchmarks were developed at a time when telecommunications services were not as diverse and dynamic as they are today. Indeed, the underlying facts and assumptions that were prevalent at the time the attribution rules were developed seem no longer to be necessarily valid. Healthy competition exists from both within and between each of the traditional service areas. For example, the Commission has found that sufficient competition exists within broadcasting to permit deletion of many of the ascertainment and commercial guidelines for radio broadcasters 3 n5 and drop many of the subscription television regulations. 3 n6 Cable, broadcast and multipoint distribution service are competing on an unprecedented level to fulfill consumers' video needs. Moreover, the recently authorized low power television 3 n7 and interim DBS service 3 n8 will provide additional competitive stimuli. Given these circumstances, the levels at which the benchmarks are set appear to be overly restrictive.

n 3 5 Radio Deregulation, 84 FCC 2d 968, recon. granted in part, 87 FCC 2d 797, (1981), appeal docketed, No. 81-1032 (D.C. Cir. Jan. 14, 1981).

n 3 6 47 FR 30069 (July 12, 1982) (to be codified at 47 CFR 73.642-643).

n 3 7 BC Docket No. 78-253, supra, n. 18.

n 3 8 Direct Broadcast Satellites, Supra, n. 17.

38. It is our tentative view that the ownership benchmarks should be raised to allow more investment in broadcast and cable facilities so as to improve the flow of capital and open opportunities for increased participation in the media distribution market. We believe that to the extent practicable all of the ownership benchmarks should be uniform and understandable. Thus, we propose that all of the benchmarks be lifted from their current levels to some point between 5% and 20%. We would treat the interests of non-corporate entities in an identical fashion. Interests greater than this benchmark but less than majority control will be subject to a rebuttable presumption that the interest held is controlling.

39. An attribution benchmark in the proposed range does not appear to be an unreasonable level that would constitute a significant ability to control licensee's policies or programming. n39 For example, a mid-point 12% corporate ownership interest constitutes less than one-eight interest in total ownership. As with any administrative decision, if experience proves our recommended benchmark to be too high, it can be scaled back accordingly by further rulemaking. Moreover, the Commission could act upon a showing that an ownership level less than the benchmark does, in fact, constitute control. Rather than hindering the public interest, we believe that increasing the ownership benchmarks will fulfill our statutory mandate to "encourage the larger and more effective use of radio in the public interest," n40 by encouraging new capital investment to invigorate the financial health of licensees and applicants and potentially improving the quality of available programming.

n 39 Various studies have used the assumption that five, ten or twenty percent ownership of the outstanding voting stock is necessary for control of larger corporations. F. M. Scherer, Industrial Market Structure and Economic Performance 32-33 (2d ed. 1980).

n 40 47 U.S.C. 303(g).

40. We would propose, therefore, to modify our ownership reporting requirements to conform to the attribution benchmark that results from this proceeding. n41 Currently, § 73.3615 of the Rules requires corporate broadcast licensees and permittees with more than 50 shareholders to file an annual report with the Commission that specifies stockholders who have 1% or more of the voting or nonvoting stock of the corporation. 47 CFR 73.3615. Additionally, § 76.403 of the Rules requires cable system operators to submit comprehensive annual ownership data upon request by the Commission. 47 CFR 76.403. We can perceive no reason to continue this inconsistency between the attribution and broadcast and cable reporting rules. Thus, we would propose to modify these rule sections to conform to the proposed attribution benchmark and require such reports only when the attribution benchmark is exceeded. The Commission may, of course, reserve the right to require licensees to report specific ownership information if the need arises.

n 41 See generally, Notice of Proposed Rule Making, Docket No. 20521, 40 FR 26543 (June 11, 1975).

41. It also appears that the current operation of the attribution benchmarks in the vertical ownership context disserves the public interest by making

cognizable, ownership interests that are too far removed from the licensee to have any effect on its policies. To correct this situation, we propose to use a multiplier, described earlier, in vertical ownership situations. We believe that the use of a multiplier will provide a sound means of limiting the attribution benchmarks to those situations where there is a reasonable connection between the investor and the licensee. n42 Moreover, we believe that the cross interest policy should conform to the attribution rules. These changes, we hope will help eliminate uncertainty and encourage more investment in telecommunications facilities.

n 42 To determine an intermediary investor's interest in a licensee, the multiplier procedure simply requires multiplication of an investor's interest in the licensee by the interest held in that investor and so on up the chain. At the point where the product is less than the benchmark, attribution stops.

42. We believe it is in the public interest to delete the existing distinction between closely-held and widely-held corporations. The current rules appear to have an unnecessarily discriminatory impact on the ability of closely-held corporations to raise capital. Therefore, we would propose to apply the same ownership benchmarks to both types of corporations.

43. Moreover, we believe that the ownership restrictions applicable to officers, directors and other representatives such as partners and trustees should be reexamined. In some cases, these officials exercise minimal power and serve in honorary or emeritus positions. We intend to explore whether in some cases it might be possible to create an insulation mechanism for officers, directors and other representatives of corporate and non-corporate entities with cognizable interests who could relinquish all authority over programming. n43

n 43 See e.g., Whitcom Investment Company, FCC 82-582, -- -- FCC 2d -- -- , (1983) (released January 6, 1983). In Whitcom, the Commission waived the network/cable television cross-ownership rule because, inter alia, of a pledge of non-participation and the proposed use of structural insulating mechanisms to "wall-off" a new partner with network ownership interests.

44. In addition to proposing new attribution benchmarks for the multiple ownership rules, the Commission is, at this time, also proposing to provide exceptions to the proposed benchmark. Although we believe that our proposed benchmark is justifiable and reasonable, it may not be appropriate in all cases. As in many areas of government regulation, it is difficult to predict with precision every future circumstance in which the attribution benchmark may be applied. In some instances, the benchmark may disserve the public interest by being too expensive or restrictive. Although we do not anticipate granting exceptions on a routine basis, they should be available where the facts of the case indicate that the public interest would be better served by deviating from the "bright line" test that we are now proposing for the attribution benchmarks. We acknowledge that experience with new attribution benchmarks may demonstrate the need for occasional exceptions.

45. It is our intention that this proceeding be, to the extent practicable, dispositive of the issues in the related docketed and undocketed multiple ownership proceedings, as well as any waiver requests that are pending at the time of publication of this Notice in the Federal Register. n44 Any outstanding proceedings not resolved by this rule making will be resolved as resources

permit. We fully intend the disposition of this proceeding to establish a comprehensive policy framework for the attribution rules.

n 44 The pending ownership proceedings are cited at notes 1 through 3 supra .

VI. Conclusion

46. By this Notice, we hope to elicit thorough analysis and discussion of the issues that have been raised. We invite concise and thorough legal briefs as well as extensive economic, social and policy analyses. Because it is expected that the staff will have a large number of comments and reply comments to synthesize, we suggest that the comments generally follow the order of discussion of issues in this Notice. The records in the consolidated proceeding should be updated where the record may be stale. Commenters should, however, avoid redundancy.

47. The Commission is particularly interested in the submission of specific, empirical data relating to the proposals set forth herein. We are interested in data that address the probable impact on diversity of ownership and concentration of control of licensees; industry's need for additional capital infusion; the probable increase of capital availability as a result of the proposed rule change; and the potential for anticompetitive practices. In addition, we seek specific comment and the submission of empirical evidence on the public interest impact of our proposed rule changes.

48. Regulatory Flexibility Act Initial Analysis. Persuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. 601 et seq. , the Commission issues the following regulatory flexibility analysis:

I. Reason for Action. This proposal was prompted by the Commission's desire to reexamine its rules and policies that attribute licensed telecommunications ownership interest to certain entities. Through this proceeding, the Commissioner seeks to establish an overall policy to assist in the resolution of several incomplete proceedings in the ownership area.

II(a). Objective. The purpose of this Notice is to initiate a rule making proceeding and seek comment on whether the Commission's current attribution rules, designed to prevent undue concentration of ownership interests, continue to serve the public interest in light of increased competition in the provision of telecommunications services and the difficulty in financing new communications ventures.

II(b). Legal Basis. The legal authority for seeking comment on these policies resides in Sections 1, 4(i), 303(r) and 403 of the Communications Act of 1934, as amended (47 U.S.C. 151, et. seq. ).

III. Description, Potential Impact and Number of Small Entities Affected. These proposals should benefit all entities seeking telecommunications licenses from the Commission that rely on external financing. Existing and potential FCC license applicants range in size from single individuals and small partnerships to multi-million dollar corporations. This proposal is expected to maintain the Commission's traditional policy of ownership diversity, while enhancing the availability of capital for applicants and licensees. Hence many small entities should find increased capital availability and more open entry into the telecommunications business.

IV. Recording, Record Keeping and Other Compliance Requirements. The ease of filing FCC Form 301 (Application for Commercial Construction Permit), Form 314 (Assignment of Broadcast Station Construction Permit or License), FCC Form 315 (Transfer of Corporate Licensee or Permitee Control) and FCC Form 325 -- schedules 3 and 4 (Cable Operator Ownership Data) should be substantially improved.

V. Federal Rules Which Overlap, Duplicate or Conflict With These Rules. There are no other federal rules that directly conflict with the Commission's attribution rules.

VI. Any Significant Alternative Minimizing Impact on Small Entities and Consistent with Stated Objectives. None.

49. Written public comments are requested on the Initial Regulatory Flexibility Analysis (IRFA) supra. These comments must be filed in accordance with the same filing deadlines as comments on the balance of the Notice, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall send a copy of this Notice to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. 601 et seq. ) (1980).

50. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that ex parte contacts are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the time a Public Notice is issued stating a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an ex parte presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff that addresses the merits of the proceeding. Any person who submits a written ex parte presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral ex parte presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each ex parte presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. See generally, 1.1231 of the Commission rules, 47 CFR 1.1231.

51. Pursuant to applicable procedures set forth in § 1.415 of the Commission's rules, interested parties may file comments on or before April 25, 1983 and reply comments on or before May 10, 1983. n45 All relevant and timely comments and reply comments will be considered by the Commission before further action in this proceeding. The Commission may also consider any other relevant information brought to its attention.

n 45 Due to the Commission's desire to act promptly on this matter and because of the large amount of information now on file in the various related dockets, we beleive this time frame is appropriate. We do not intend to grant extensions of time to any commenters in this proceeding except for exceptionally compelling circumstances.

52. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a written summary indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order. In accordance with the provision of § 1.419 of the FCC's Rules and Regulations, an original and 5 copies of all comments, replies or other documents filed in this proceeding shall be furnished to the FCC. Participants filing the required copies who also desire that each Commissioner receive a personal copy of the comments may file an additional 6 copies. Members of the general public who wish to express their interest by participating informally in this proceeding may do so by submitting one copy of their comments, without regard to form, provided that Mass Media Docket No. 83-46 is specified in the heading. Such informal participants who desire that responsible members of the staff receive a personal copy may file an additional five copies. Responses will be available for public inspection during regular business hours in the Commission's Public Reference Room (Room 239) at headquarters in Washington, D.C. (1919 M Street, N.W.). Further information concerning this proceeding may be obtained from Randy W. Thomas, Office of General Counsel, 202-632-6990.

(Secs. 4,303, 48 stat., as amended, 1066, 1082; 47 U.S.C. 154, 303)

Federal Communications Commission.

William J. Tricarico,

Secretary.

Joint Concurring Statement of Commissioners Henry M. Rivera and Joseph R. Fogarty

In Re: Notice of Proposed Rulemaking on Ownership Attribution Rules

We concur in the adoption of this Notice of Proposed Rulemaking (NPRM), but only because we agree that existing ownership attribution benchmarks may be ready for reevaluation and, in some instances, upward adjustment. n46 The tentative recommendations outlined in paragraphs 37-44 of the Notice are not our recommendations, and we strongly disagree with the overall approach to attribution espoused by this NPRM.

n 46 For example, the Final Report of the Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications recently recommended that the FCC liberalize the attribution benchmarks applicable to MESBICs and

SBICs, which often serve as lenders to prospective minority media owners. Those proposals are highly meritorious and worthy of adoption because of the important policy goal they would further. It is most unfortunate that these recommendations are all but buried in the instant Notice. We hope they will not be overlooked by the commenters, since they were a key element of the Advisory Committee's plan to increase minority participation in telecommunications.

While the Notice prominently cites the hardship that the existing rules work on minorities, and the benefits that radically elevated benchmarks would confer upon them, we note that if the Commission wished specifically to address the financing problems faced by minorities, it could tailor special attribution rules for minority ownership enterprises rather than propose a reflexive opening of the concentration floodgates.

As an initial matter, this Notice is ill-advised because it continues this Commission's newfound penchant for piecemeal evaluation of ownership issues. Picking off longstanding ownership rules one by one can only produce disjointed results, n47 and give credence to criticism that this agency has abandoned its interest in promoting diversity of expression through effective structural restraints.

n 47 Currently pending before the Commission are other proceedings designed to eliminate existing structural restraints, and several Commissioners have publicly stated their interest in reexamining still other restrictions on ownership. The Commission cannot, however, revise its ownership rules in a coherent manner if it examines each one in isolation. In the cable/network ownership rulemaking, for example, the Commission has proposed a media concentration index to safeguard against excessive domination by any one entity. If adopted, however, the index would perforce conflict with the policy premises of the so-called seven-station rule, leaving at least the impression that the rule had been amended without public comment, let alone agency forethought. Similarly, in the context of this NPRM, if a twenty percent benchmark is adopted and no duty to report ultimate beneficial owners is imposed, an entity could easily defeat existing multiple and cross-ownership restrictions by creating several layers of wholly-owned intermediate companies, each holding less than the operative attribution benchmark.

We are not contending that the Commission cannot make a judment on any of its ownership rules unless it conducts a "massive" omnibus proceeding on ownership; we do submit that the Commission must at least expressly acknowledge and analyze the impact of proposed changes on interdependent existing rules and policies, and should time the various proceedings such that we have the information necessary to make intelligent decisions.

The essential premise of this Notice is also misguided. The NPRM proceeds from a belief that the attribution rules "may work against the realization of an efficient nationwide radio service," paragraph 15, and goes on to argue that the rules must be scrutinized so that the costs they impose on society "are not excessive or [do not] create disproportionate economic inefficiencies." Id. The item further observes that the attribution rules operate to restrict combinations permissible under the Justice Department's revised antitrust and merger guidelines, paragraph 16, and implies that such inconsistency alone warrants their amendment.

By attempting to ground the Commission's ownership attribution benchmarks primarily in principles of "economic efficiency," and proposing their substantial upward amendment in accordance with that reformulation, this Notice advocates a deep and disturbing break with bedrock public policy governing media ownership. At the heart of the existing multiple ownership rules is the Commission's historic policy favoring diversification of ownership and control. The FCC has long emphasized that:

[T]he fundamental purpose * * * of the multiple ownership rules is to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent undue concentration of economic power contrary to the public interest. n48

n48 Amendment of Multiple Ownership Rules, 18 FCC 288, 291-92 (1953); see also FCC v. Nat'l. Citizens Comm. for Broadcasting, 436 U.S. 775, 780 (1980).

The public interest rationale for a dramatic policy shift away from these established principles to the putative virtues of economic efficiency is less than self-evident. The Notice expresses concern that the current benchmark may inhibit capital investment in media industries subject to our regulation, but other than the evidence compiled by the Advisory Committee's Final Report, See note 1 supra, no evidence -- empirical, anecdotal or otherwise -- is cited for the proposition that those industries are lacking in needed capital infusions or that the public interest is in any way suffering as a result of the existing attribution rules. Paragraph 26 of the Notice emphasizes that "specific data and facts should be provided to demonstrate whether the current rule structure is justified;" unfortunately, the Notice does not subject its new policy predisposition to the same rigorous test. It is even more unfortunate that this glib shift in the burden of policy persuasion has not been squared with basic First Amendment principles. n49

n49 As the Supreme Court has stated: "The 'public interest' standard necessarily invites reference to First Amendment principles * * * and, in particular, to the First Amendment goal of achieving 'the widest possible dissemination of information from diverse and antagonistic sources.' " FCC v. Nat'l. Citizens Comm. for Broadcasting, 436 U.S. at 795 (citations omitted, emphasis added). Given these paramount policy guideposts, our media ownership policies should "never be driven by a desire to facilitate a market structure which, short of domination by a few firms, would yield maximum organizational efficiencies." Report and Order Terminating Docket 18891, -- -- FCC 2d -- -- (1982).

It also bears emphasizing that many of the economic arguments against retention of existing attribution rules apply equally to the FCC's "substantive" ownership restrictions. To the extent this proceeding is designed to rule on the validity of such arguments, it appears specious to maintain that "it is not the Commission's intention * * * to evaluate the underlying premises of individual multiple ownership rules * * *." See NPRM at n.4.

In seeking to identify the level at which investors may control programming, rather than the level at which programming influence is possible, the Notice further underscores its apparent disinterest in promoting diversity of ownership and viewpoint. In its several prior reexaminations of the attribution benchmarks, the Commission has consistently emphasized that ability to influence should be the focus and concern of FCC ownership rules. In this connection, the Commission has stated:

The principle of diversification and the realities of the situation require that no distinction be made between a minority non-controlling interest and a full or controlling one. While the holder of a small interest in many instances may have a slight influence on the operation of the station in question, it is also true such a person can exert considerable influence -- to an extent clearly within the objectives and purview of the prescribed diversification policy. n50

n 50 Amendment of Multiple Ownership Rules, 18 FCC 288, 292-93 (1953).

In the light of this consistent precedential emphasis on programming influence, the failure of the Notice to explain and justify its shift in focus to programming control makes what might otherwise be perceived as subtle inquiry an obvious exercise in predestination.

The NPRM is also seriously flawed by its impoverished analysis of this refined and complicated area of ownership attribution benchmarks. The superficial approach taken by the Notice not only disserves the commenting parties by forcing them to shadow-box untenable options, but also sells this agency short by creating the unfortunate impression that we have little appreciation of the business environment in which our regulatees operate. Stripped of rule citations and history, open-ended questions, and rhetorical assertions about competition and change, the Notice is little more than two pages of conclusory "tentative recommendations." An expert agency should look like one; we regret having to observe that such expertise is notably lacking here.

Turning to specific weaknesses, the Notice's failure to analyze, even superficially, the characteristics of various common business entities and investment arrangements -- for example, the significant differences between closely-held and widely-held corporations -- has led it to the unrealistic and unwise tentative recommendation that all investors be subject to identical attribution benchmarks. Can it seriously be arrgued that ten percent holdings in a publicly-traded company and in a closely-held company with a handful of stockholders confer equivalent potential for decision making influence or control? It is equally implausible that an institutional investor, such as a pension fund, no matter how "passive" its intentions, will not dominate with a ten, fifteen or twenty percent interest in a publicly-held media company. The Commission previously took cognizance of these business realities by shaping rules appropriate to particular classes of entities. This rulemaking should have continued that level of analytic sophistication.

The failure of the NPRM to recognize and deal intelligently with basic business realities is more than matched by its cursory analysis of the quantitative benchmark issue. Here, the Notice makes a decisive, if silent, break with past Commission proceedings on attribution of ownership. This lapse of institutional memory is evident from the fact that an outstanding Further NPRM on this identical subject -- proposing to raise the benchmark across-the-board to ten percent, except for purposes of the seven-station rule

-- is barely referenced, and no rationale is supplied for rejecting that approach in this proceeding.

Still more troubling is the unexplained departure of this Notice from the Commission's prior view of the relevance of benchmarks set elsewhere in the Communications Act or other federal statutes to the decision as to when and where our ownership rule restrictions should apply. The Commission previously rejected cross-reference to such other statutory guidelines, stating:

The Communications Act uses a figure of 20 percent with regard to alien control of a broadcast corporation, and we have noted that the Investment Company Act uses a standard of 25 percent. In other words, under one set of circumstances legislators have agreed on one figure; in different circumstances, on another. Although in other contexts, and for other purposes, other standards might be appropriate, we believe that in the field of broadcasting, where the important public interest consideration of preserving diversity of programming and service viewpoints attaches, special caution is warranted. n51

n 51 Multiple Ownership of AM, FM and TV Stations, 13 FCC 2d 357, 370 (1968).

Despite this prior interpretation and conclusion, and the absence of any intervening legislation or other congressional declaration, this Notice now blithely suggests that Congress may have intended the alien ownership maximum of Section 310 of the Communications Act to serve as a guide for determining when all other ownership rules should become operative. n52 If any federal standard should serve to inform us on the issue, why not the five percent benchmark specified by the Securities and Exchange Act as the level that confers the potential to affect a company's decisions? n53 Again, a public interest rationale for the preferences of this Notice is less than intuitively obvious.

n 52 The alien ownership restrictions of the Communications Act were fashioned to curb alien activities against the United States in time of war. See Hearings on H.R. 8301 Before the House Comm. on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 26 (1934). Those provisions of Section 310 have remained essentially unchanged since 1934.

n 53 The Securities and Exchange Act of 1934 provides that a person who acquires more than five percent of certain classes of securities must disclose specific ownership and background information to the issuer, the stock exchanges, and the SEC. 15 U.S.C. 78m(d)(i) (1976). The purpose of this reporting requirement is to protect other investors in those securities and to maintain investor confidence in exchange markets by discouraging insider trading. See H. Rep. No. 1383, 73d Cong., 2d Sess. 13 (1934). Originally, the Act provided for disclosure by beneficial owners of more than ten percent of any equity security registered on a national securities exchange. 4 B. Schwartz, The Economic Regulations of Business and Industry 2933-34 (1973). However, in 1970, Congress amended the Act to require disclosure of holdings of more than five percent. Pub. L. No. 91-567 (Dec. 22, 1970). This amendment was designed to give extra protection to investors with respect to corporate tender offers and other securities acquisitions. The lower level of five percent was intended to prevent persons from obtaining eight or nine percent of a company's stock to avoid the original disclosure requirement, a practice which Congress believed deprived investors of information necessary to make certain investment decisions. It is significant to our inquiry here that Congress concluded that purchases of over five percent are material to investment decisions because they can lead to important changes in the management or business of a company. See H. Rep. No. 1655, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. and Admin. News 5025, 5027-28.

The tentative recommendation to require ownership dislosure only when the attribution benchmark is exceeded is also highly inappropriate because it poses a significant threat to fundamental interests in robust economic competion and spirited competition in ideas. Not requiring identification of the ultimate beneficial owners of any company holding less than twenty percent of an entity with media interests would enable parties to violate existing local and regional concentration rules in some cases, n54 and to go undetected as media participants in others. n55 Those who have the capacity to use the airwaves and the power to influence public opinion should be known to the public and this Comission. Accordingly, if the Commission decides to raise existing benchmarks, it should require parties to report interests that fall short of the new level and should devise a means to detect violation of remaining ownership limitations.

n 54 For instance, under the approach outlined in the Notice, an entity seeking to control a newspaper and television station serving the same commuity in violation of the newspaper broadcast cross-ownership ban could easily do so without detection simply by holding either media outlet through six wholly-owned subsidiaries, five owning 19.9 percent each and the sixth owning the remaining .5 percent. The Notice's contention that such circumvention is possible even now completely overlooks the fact that such evasion would be extremely cumbersome, and therefore unlikely with a one percent benchmark. That would not be true if the attribution ceiling were lifted to fifteen or twenty percent.

n 55 It is unclear, for example, how the Commission would be able to promote one of its primary broadcast licensing objectives -- maximum diffusion of control -- in the comparative hearing process if interests that are significant are not required to be reported.

One might be tempted to take some comfort in the fact that the Notice outlines a fairly broad range of options. A cursory reading of the Notice quickly makes plain, however, that most of the listed options are decorative only. For instance, it is difficult to credit the possibility that the Commission will adopt the ad hoc factor analysis described in paragraphs 23-24. That approach would produce nothing short of an administrative and business planning nightmare. n56 The Commission long ago recognized that ineluctable effect, and abandoned the practice of making individualized determinations of multiple ownership issues in favor of hard-and-fast rules on cognizable interests. n57 Furthermore, the suggestion that the FCC or the general public bear the burden of proving "actual control" under an ad hoc approach is particularly disingenuous from the standpoint of a continuing Commission commitment to furthering diversity of ownership, given the limited resources and incentives for "outsiders" to make such showings.

n 56 An ad hoc approach to attribution would sap our limited agency resources, inevitably produce inconsistent and arbitrary results, and make it virtually impossible for businesses to plan their endeavors with any reasonable degree of advance assurance.

n 57 See Multiple Ownership of Standard, FM and Television Broadcast Stations, 45 FCC 1476, 1749 (1964); Multiple Ownership of Standard, FM and Television Broadcast Stations, 53 RR 2d 85, 89 (1975).

Maintenance of the status quo, another option identified, is theoretically possible but unlikely as a practical matter given the sanguine but largely rhetorical references of the Notice to the "dynamic," "rapid," "significant," and "competitive" changes that have occurred in telecommunications since the prevailing benchmarks were adopted. n58 However, in view of the paucity of data and analysis proffered to support the "tentative recommendations" of this NPRM, preserving the status quo may be the most rational of the posited alternatives.

n 58 It is "little more than wishful thinking to predicate a finding of 'workable competition' on new technology and services (e.g., DBS, Low Power TV, and fledgling STV and MDS) which are more on the horizon than with us here and now. In the final analysis, this Commission must have more than merely the assumption of a 'workably competitive' marketplace as the basis for policy making." Staff Report, FCC, FCC Policy on Cable Ownership 1, 1-2 (Nov. 1981) (Concurring Statement of Commissioner Joseph R. Fogarty).

February 7, 1983.

Concurring Statement of Commissioner Anne P. Jones

In Re: Notice of Proposed Rulemaking on Attribution of Ownership Interests in Broadcast, Cable Television, and Newspaper Entities

There are a number of things about this Notice which trouble me, perhaps most especially the "tentative recommendations" in it, which I am not prepared to endorse. However, I agree that reexamination of these rules and policies may be worthwhile, so I concur in issuance of the Notice.
[FR Doc. 83-6216 Filed 3-9-83; 8:45 am]

BILLING CODE 6712-01-M

FILE COPY

No. 89-700

Supreme Court, U.S.
FILED
FEB 9 1990
JOSEPH F. SPANIOL, JR.

# In the Supreme Court of the United States

OCTOBER TERM, 1989

---

ASTROLINE COMMUNICATIONS CO.
LIMITED PARTNERSHIP, PETITIONER

*v.*

SHURBERG BROADCASTING OF HARTFORD, INC., ET AL.

---

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

**BRIEF FOR FEDERAL COMMUNICATIONS COMMISSION**

---

ROBERT L. PETTIT*
*General Counsel*

DANIEL M. ARMSTRONG
*Associate General Counsel*

C. GREY PASH, JR.
*Counsel*

*Federal Communications Commission
Washington, D.C. 20554
(202) 632-7112*

* *Counsel of Record*

1

## QUESTION PRESENTED

Whether the Federal Communications Commission's minority distress sale policy, which permits a limited category of existing radio and television broadcast stations to be transferred only to minority-controlled firms, violates the equal protection component of the fifth amendment.

2

## TABLE OF CONTENTS